UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL BOCK, JR., Plaintiff, *vs.* PRESSLER AND PRESSLER, LLP, Defendant.	Case No.: 2:11-cv-07593-KM-SCM

BRIEF ON BEHALF OF
PLAINTIFF, DANIEL BOCK, JR.
ESTABLISHING ARTICLE III STANDING

[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

Daniel Bock, Jr. has standing because he pled and proved a concrete harm based on both tangible and intangible injuries. The Court of Appeals vacated this Court's 2014 judgment and remanded the case for this Court to evaluate standing following the Supreme Court's recent decision in *Spokeo v. Robins,* 136 S.Ct. 1540 (2016). Like the overwhelming majority of post-*Spokeo* standing decisions in cases arising under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, this Court should also conclude that Pressler's invasion of Bock's legislatively-created private rights is itself a concrete injury. In addition, the record clearly demonstrates the existence of both a tangible and intangible concrete harm.

Based on Bock's standing, the Court should re-enter the vacated judgment.

STATEMENT OF THE CASE

The Court of Appeals vacated this Court's judgment and remanded "this case to the District Court to determine in the first instance whether Bock has Article III standing." [D.E. 74-2 at 5]; *Bock v. Pressler & Pressler, LLP*, No. 15-1056, 2016 WL 4011150, *2 (3d Cir. July 27, 2016). For the sake of brevity, and in light of the ordered page limitation [D.E. 82], Bock references the following record:

1. The pleadings [D.E. 1 & 7];
2. The record supporting the summary judgment motions;[1]
3. Court's Opinion [D.E. 59] as modified [D.E. 61 & 62];
4. Judgment [D.E. 67];
5. The Third Circuit's Mandate [D.E. 74]; and

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[1] Defendant's evidential materials included an affidavit which Defendant sought to file under seal. Defendant's motion was denied in part [D.E. 55] and Defendant filed a partially redacted affidavit. D.E. 56. On appeal, Defendant elected not to seal the unredacted affidavit. Thus, the unredacted affidavit ought to be unsealed.

6. Declaration of Daniel Bock, Jr. filed with this Brief.

On September 2, 2016, this Court entered an Order setting deadlines for the Parties' briefs on the remanded issue. [D.E. 82]

LEGAL ARGUMENTS

POINT I: DANIEL BOCK, JR. HAS STANDING TO ASSERT A CLAIM FOR PRESSLER'S VIOLATION OF HIS LEGISLATIVELY-CREATED RIGHTS.

The Supreme Court's recent *re*-enunciation of standing analysis followed by the Third Circuit's mandate to apply that analysis does not change the ultimate result here. The record establishes all elements supporting Bock's standing. Hence, judgment should be entered again on the same terms as the prior one. *See*, Judgment [D.E. 67].

A. Standard of Review

Bock, as the plaintiff, bears the burden to establish the elements of standing "[h]owever, 'general factual allegations of injury resulting from the defendant's conduct may suffice.'" *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

> "To establish Article III standing, a plaintiff must demonstrate '(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.'"To allege an injury-in-fact, "a plaintiff must claim 'the invasion of a concrete and particularized legally protected interest' resulting in harm 'that is actual or imminent, not conjectural or hypothetical.'"A harm is "particularized" if it "affect[s] the plaintiff in a personal and individual way." It is "concrete" if it is "'*de facto*'; that is, it must actually exist" rather than being only "abstract."

In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 272 (3d Cir. 2016) (quoting *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016), *Lujan*, 504 U.S. at 561 n 1, and *Spokeo v. Robins*, 136 S.Ct. 1540, 1548 (2016)).

Spokeo "did not change the rule for establishing standing" but rather "used strong language indicating that a thorough discussion of concreteness is necessary in order for a court to determine whether there has been an injury-in-fact." D.E. 74-2 at 4; *Bock*, 2016 WL 4011150, *1. Thus, the focus here will be on concreteness; specifically, the concreteness of the harm to Bock on his claim seeking "additional damages" as allowed by statute. 15 U.S.C. § 1692k(a)(2). Pressler stipulated to the maximum allowable "additional damages." [D.E. 64]. The remaining elements for standing become self-evident upon the conclusion of the first element.

B. From Article III to Concreteness

The Constitution mandates:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority

U.S. Const. Art. III, § 2, cl. 1. Bock's claim arises under "the Laws of the United States." *Id.*

The standing question, however, determines whether Bock presented a "case" within the meaning of Article III. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It asks, "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99. The "inquiry focuses on whether the plaintiff is the proper party to bring this suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Thus, a "plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct." *Id.* (internal quotation marks omitted). The injury "must be legally and judicially cognizable," which requires that the plaintiff suffered "'an invasion of a legally protected interest which is…*concrete* and *particularized*.'" *Id.* at 819 (quoting *Lujan*, 504 U.S. at 560) (emphasis added). But, "a plaintiff need not show actual monetary loss for purposes of injury in fact." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015).

In *Spokeo*, the Supreme Court "discuss[ed] the particularization and concreteness requirements." *Spokeo*, however, never applied those requirements to the facts presented. Instead, the Supreme Court remanded the case to the Ninth Circuit for having failed to address concreteness and took "no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct." *Spokeo*, 139 S.Ct. at 1550.

Spokeo correctly observed that a concrete injury can be tangible (such as injuries which give rise to common law damages) but "'[c]oncrete' is not, however, necessarily synonymous with 'tangible.'" *Id.* at 1549. Thus, a concrete injury can arise from an intangible harm. *Id.* Intangible harm need not have ripened into an actual injury but, at a minimum, must "constitute a 'risk of real harm' to the plaintiff." *Lee v. Verizon Commc'ns, Inc.*, No. 14-10553, __ F.3d __, 2016 WL 4926159, at *1 (5th Cir. Sept. 15, 2016) (quoting *Spokeo*).

The concreteness of an intangible harm arises from consideration of two matters: "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts;" and whether Congress, which is "well positioned to identify intangible harms that meet minimum Article III requirements," has "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* Thus, according to the Third Circuit's post-*Spokeo* decision, "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Nickelodeon*, at 273 (internal quotation marks omitted).

Spokeo properly cautioned, however, that there can be no injury-in-fact when a plaintiff merely alleges "a bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S.Ct. at 1549. Here, however, Bock has not pled "a bare procedural violation." *Id.* Instead, Bock pled Pressler's false, deceptive and misleading representations—substantively prohibited by

Section 1692e and FDCPA case law—were made in an attempt to collect a debt from him.

C. Bock's Concrete Interest

Bock's claim arises under the FDCPA based on Congress's explicit prohibition against a debt collector's use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt" from him. 15 U.S.C. § 1692e. Section 1692e gives consumers the right to a debt collector's complete honesty because some truthful statements standing alone can nevertheless mislead. *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 172 (6th Cir. 2011). Similarly, deception law in this Circuit has long recognized that, as goes the old proverb, "a half-truth is a whole lie." *See, e.g., Brown v. Card Service Center*, 464 F.3d 450, 453-54 (3d Cir. 2006) (deceptive threat of suit); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 202 (3d Cir. 1990) (recognizing half-truths as "analytically ... closer to lies than to nondisclosure").

Thus, the FDCPA, at § 1692e, imposed a legal duty on Pressler to disclose to Bock truthful and non-misleading information. Bock pled and proved Pressler's breach of that duty which, under *Spokeo*, is sufficiently concrete on its own. *Spokeo*, 136 S. Ct. at 1549–50. Bock "need not allege any additional harm" to satisfy Article III's concreteness requirement. *Id.* at 1549. "Intangible harms that may give rise to standing also include harms that may be difficult to prove or measure, such as unlawful denial of access to information subject to disclosure." *Nickelodeon*, 827 F.3d at 273–74 (internal quotation marks omitted).

Pressler's misconduct also presents a risk of harm which the FDCPA sought to curtail. Congress found "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Congress further concluded "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692(b). Thus, those injuries were elevated by Congress to be legally cognizable injuries and, therefore, concrete.

Congress declared that the risk of these injuries flowed from the conduct it was prohibiting and that conduct included the use of false, deceptive or misleading representations or means in the attempt to collect a debt 15 U.S.C. § 1692e.

That prohibited conduct—specifically, the misrepresentation as to an attorney's involvement in connection with a court-filed collection complaint—is closely related to the injury arising from attorney deceit traceable back to the Statute of Westminster of 1275. *Amalfitano v. Rosenberg*, 903 N.E.2d 265, 267–68 (N.Y. 2009). The Supreme Court has traced the roots of Rule 11 back to the sixteenth century during the Chancellorship of Sir Thomas More. *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc*., 498 U.S. 533, 556–57 (1991).Thus, consistent with *Spokeo*'s guidance, Pressler's invasion of Bock's concrete interest is supported by both history and Congress's judgment.

Pressler's conduct created a risk of real harm to Bock—who has never before (or since) been sued. [Bock Decl., ¶3]. Pressler's public filing of the collection complaint after *no* meaningful attorney review placed what had been a private matter into the public domain thereby invading Bock's privacy. Anyone interacting with Bock became able to consider the pending lawsuit in how they dealt with him. The pending lawsuit risked instability in his personal, marital, and employment relationships. Furthermore, the movement of the debt closer to an enforceable judgment increased the risk of him filing a personal bankruptcy and have negative consequences on his credit standing, all of which would for years negatively affect him, his family, and fiancé. *Id.* at ¶15. The Pressler lawsuit was a frightening and humiliating experience for Bock, which wrongly caused him significant stress, anxiety, and money to defend (including time away from work). *Id.* at ¶¶ 4-6; 10-11; and 15.

Post-*Spokeo,* it has been re-affirmed that the improper filing of a debt collection complaint creates concrete harm for standing. In *Lane v. Bayview Loan Servicing, LLC,* No. 15 C 10446, 2016 WL 3671467 (N.D. Ill. July 11, 2016), the court held that *Spokeo* had not altered *Phillips v. Asset Acceptance, LLC,* 736 F.3d 1076 (7th Cir. 2013):

> *Phillips* held that debtors had standing to sue where the debt collectors filed allegedly unlawful debt-collection suits, even though the debt collectors never served the complaint on the plaintiff [reasoning] that pending legal actions (even if not served) can "be a red flag to the debtor's other creditors" or "pressure a debtor to pay back the debt informally," and those harms qualified as actual harm that was enough for standing.

Lane, 2016 WL 3671467, at *5.

Thus, concreteness is further satisfied by the risk to Bock of real harm—harm which is within the sphere of injuries the FDCPA sought to prevent.

Having been served with a collection complaint, Bock then sought to protect his interest. Had Pressler's complaint disclosed the true extent of attorney involvement, Bock could have sought relief from it including withdrawal or dismissal. *See,* N.J. Court Rule 1:4-8. Unaware of that fact and acting *pro se*, he timely filed an Answer and paid the required $15.00 filing fee and approximately $8.00 for mailing it (never mind the cost of gas and time expended in going to the post office). [Bock Decl., ¶6; *see also*, D.E. 32-5 (page 7 or 48) at PageID 174]. Subsequently, he hired a lawyer to represent him at a cost of $1,000. Actual damages in the form of attorney's fees incurred in defending against a wrongful state court collection complaint may be recoverable as damages under the FDCPA, *Walton v. Pereira*, 995 F.Supp.2d 437 (W.D. Pa. 2014), and such an out-of-pocket loss similarly establishes concrete harm. Then Bock, without *any* admission of liability, agreed to pay—and did pay—$3,000 (being about 36% of the amount falsely demanded [D.E. 32-5 at PageID 171]) to settle the wrongfully commenced lawsuit without any admission of liability. [Bock Decl., ¶¶15-17]. In short, Bock settled Pressler's wrongful lawsuit *solely* for the purpose of buying himself peace, to eliminate the stress and anxiety the lawsuit was causing him, and to eliminate any potential risk of a judgment being entered against him (for any amount) which might cause him to file bankruptcy and have negative consequences on his credit standing, all of which would for years negatively affect him, his family, and his future wife. *Id.*

D. Post-Spokeo FDCPA Decisions

There have been several post-*Spokeo* cases addressing concreteness based on FDCPA claims. We have found one from a Court of Appeals and several from District Courts.

In the only decision found within the Third Circuit, the court concluded that concrete harm for Article III purposes existed on a claim for an FDCPA violation because the barcode of the account number was visible through the glassine window on an envelope containing the collection letter. *Daubert v. Nra Grp., LLC*, No. 3:15-CV-00718, 2016 WL 4245560 (M.D. Pa. Aug. 11, 2016).

Linehan v. Allianceone Receivables Mgmt., Inc., No. C15-1012-JCC, 2016 WL 4765839 (W.D. Wash. Sept. 13, 2016) collected nine post-*Spokeo* decisions involving FDCPA cases. Based on the reasoning in those case, the court concluded that the invasion caused by a violation of the FDCPA itself confers standing. It explained, "The goal of the FDCPA is to protect consumers from certain harmful practices; it logically follows that those practices would themselves constitute a concrete injury." Bock also relies on those nine cases.

One of those cases was *Church v. Accretive Health, Inc.*, No. 15-15708, __ Fed. Appx. __, 2016 WL 3611543 (11th Cir. July 6, 2016). There, the court concluded the FDCPA did not apply because the alleged debt was not in default but first addressed the plaintiff's standing.

> Church has alleged that the FDCPA governs the letter at issue, and thus, alleges she had a right to receive the FDCPA-required disclosures. Thus, Church has sufficiently alleged that she has sustained a concrete—*i.e.*, "real"—injury because she did not

> receive the allegedly required disclosures. The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled. While this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear an injury need not be tangible to be concrete. Rather, this injury is one that Congress has elevated to the status of a legally cognizable injury through the FDCPA. Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement.

Id. at *3 (footnotes and citations omitted).[2]

We found other decisions not cited in *Linehan*. *Lane* is discussed above. They include:

- Consumer's allegation that the collector filed a collection complaint in violation of the FDCPA "sufficiently alleges that he suffered a concrete, particularized injury." *Nyberg v. Portfolio Recovery Associates, LLC*, No. 3:15-CV-01175-PK, 2016 WL 3176585, at *7 (D. Or. June 2, 2016).

- In *Sayles v. Advanced Recovery Sys., Inc.*, No. 3:14-CV-911-CWR-FKB, 2016 WL 4522822 (S.D. Miss. Aug. 26, 2016) a concrete harm exists on § 1692e claim where plaintiff alleged that collector failed to note account was disputed on credit report.

- "Congress gave consumers a legally protected interest in certain information about debts, and made the deprivation of information about one's debt (in a communication directed to the plaintiff consumer) a cognizable injury." *Saenz v. Buckeye Check Cashing of Illinois*, No. 16 CV 6052, 2016 WL 5080747, at *2 (N.D. Ill. Sept. 20, 2016). Consequently, the consumer's allegation of receipt of a communication which was false, deceptive or misleading was sufficient to establish standing.

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[2] Disagreeing with *Church*, a District Court limited its holding § 1692g claims explaining it did "recognize[] that violations of other FDCPA provisions may be sufficient *on their own* to constitute an Article III injury in fact." *Jackson v. Abendroth & Russell, P.C.*, No. 416CV00113RGEHCA, 2016 WL 4942074, at *11 (S.D. Iowa Sept. 12, 2016) (emphasis added).

Consistent with these decisions, Pressler's misrepresentation of attorney involvement with respect to the collection complaint violated Bock's rights as established by the FDCPA. Consequently, he has a legally protected concrete interest in his claim based on that violation.

CONCLUSION

For the foregoing reasons, Plaintiff, Daniel Bock, Jr. respectfully requests that the Court determine Plaintiff has standing so as to give this Court subject matter jurisdiction under Article III of the United States Constitution and enter final judgment consistent with the previously entered judgment [D.E. 67] based on the Court's Opinion [D.E. 59] (as corrected by D.E. 61 & 62) and the Stipulation of Damages [D.E. 63].

Respectfully submitted,

s/Philip D. Stern

Dated: October 3, 2016 Philip D. Stern

s/Andrew T. Thomasson

Dated: October 3, 2016 Andrew T. Thomasson

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